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MICHAEL RODAK, JR., CL

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1696

GREAT LAKES CAR DISTRIBUTORS, INC.,
Petitioner,

vs.

KIBSGARD SPORTS CAR CENTER, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

Neither the opinion of the District Court nor the order vacating the summary judgment by the court of appeals is reported. They are set forth in Petitioner's Brief, Appendix C, p. 28, Appendix A, p. 25.

JURISDICTION

The court of appeals order was directed (?) April 13, 1973. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

STATUTES AND RULES INVOLVED

15 U.S.C. Chapter 27, entitled "AUTOMOBILE DEALERS SUITS AGAINST MANUFACTURERS," was enacted August 8, 1956 (70 Stat. 1125). It provides, in pertinent part, as follows:

"§ 1221. **Definitions**

As used in this chapter—

(a) The term 'automobile manufacturer' shall mean any person, partnership, corporation, association, or other form of business enterprise engaged in the manufacturing or assembling of passenger cars, trucks, or station wagons, including any person, partnership, or corporation which acts for and is under the control of such manufacturer or assembler in connection with the distribution of said automotive vehicles.

* * * * *

"§ 1222. **Authorization of suits against manufacturers; amount of recovery; defenses**

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce . . . and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided,* That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith."

Rule 56. Summary Judgment

"(e) Form of Affidavits; Further testimony; Defense required. Supporting and opposing affidavits shall be

made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . ."

QUESTIONS PRESENTED

1. Whether the trial court acted improvidently in granting a motion for summary judgment where the parties disagree in good faith as to the inferences to be drawn from the facts.

2. The Court of Appeals for the Sixth, Ninth, Fourth, Tenth and Eighth Circuits have held it improvident.

STATEMENT

Respondent alleged a violation of Title 15, U.S.C., Section 1221, et seq. It is a corporation engaged in selling new and used cars in Hancock County, Ohio. Petitioner, a Delaware Corporation, is the authorized distributor of new motor vehicles manufactured by the British Leyland Motors, Inc. It entered into a number of franchise agreements with Respondent over a period of years for the selling of its Austins, Jaguars, M.G.'s, Rovers, Land Rovers and Triumphs.

The last such franchise agreement between the parties expired September 30, 1970.

Respondent charged defendant with bad faith in failing to renew its franchise agreement.

Petitioner, generally, admitted the agreement and the relationship of the parties, but denied breach or any exercise of bad faith. It alleged that Respondent refused to accept a new distributor-dealer agreement and, the Plaintiff was guilty of bad faith in its transaction with defendant.

Petitioner filed a motion for summary judgment based upon the fact that it was not a manufacturer or assembler of motor vehicles and was not acting for or under the control of any such manufacturer within the meaning of Title 15, U.S.C., Section 1221, et seq. The trial court found that there was no agency relationship between petitioner and the manufacturer of the motor vehicles to confer a cause of action on the respondent under Title 15, against the petitioner under the franchise agreement, as it was not under the control nor did it act for the manufacturer.

Petitioner, in support of the motion, filed an affidavit which contained conclusions of Affiant as to the status between the petitioner and the B. L. M. Distributor. It also attached a copy of the agreement to the Affidavit.

That agreement in and of itself provided what British Leyland Motors Inc., (BLM) could do by way of control.

Among other things, petitioner, an exclusive distributor for a specific geographical area, was required to submit orders on BLM forms, to abide by prices fixed by BLM; to accept motor vehicles at a port of entry designated by BLM; was required to maintain comprehensive inventory of parts acceptable to BLM; it had to supplement its stocking program of parts as required by BLM; was to appoint dealers in the area satisfactory to BLM; BLM had the right to visit dealers and inspect premises; BLM provided all forms used by petitioner; was required to maintain a staff and faculty satisfactory to BLM; BLM specified service procedures to be followed by petitioner; was required to maintain records and BLM had the right to inspect and audit.

It would be hard not to conclude that there was no agency or control which would fall within the definition of Title 15, Section 1221 (a).

The United States Sixth Circuit Court of Appeals

vacated the trial court's ruling, on the basis of *S. J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235 (6th Cir. 1963). *cert, denied,* 375 U.S. 824.

ARGUMENT

The Sixth Circuit said in the Groves case:

> "It is often the case, that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was, as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist, should be drawn from such facts. Under such circumstances, the case is not one to be decided by the trial judge on a motion for summary judgment" 315 Fed. 2d 237, 238.

The court further stated:

> "This court has on several occasions, expressed the view that a trial judge should be slow in disposing of a case of any complexity on a Motion for Summary Judgment, while such a judgment wisely used is a praise worthy and time saving device, if such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one."

In addition to a long series of cases in the Sixth Circuit, the same standard of deciding motions for summary judgment has been used and approved in the Ninth Circuit, *Cameron v. Van Couver Plywood,* 266 F.2d 535 (1959); the Fourth Circuit, *Girard v. Gill,* 261 F.2d 695 (1958); *Stevens v. Howard Johnsons,* 181 F.2d 390 (4th Cir. 1950); and the Tenth Circuit, *United States v. Kansas Gas & Electric,* 287 F.2d 601 (1961); Eighth Circuit, *Sev-*

erson v. Fleck, 251 F.2d 920 (1958), and the *Oral Trading v. Texas Refining*, 201 F. Supp. 846, Southern District of New York (1962).

Since the *Groves* case, the Sixth Circuit has followed that opinion in *Hart v. Johnson*, 389 F.2d 239, 242 (1968); *Columbus Services, Inc. v. Preferred Building Maintenance, Inc.*, 398 F. 2d 80, 82 (1968), *Equal Employment Opportunity Commission v. United Association of Jurymen, etc.*, 427 F.2d 1091, 1093 (1970), *cert. denied*, 404 U.S. 832.

In *Associated Press v. United States*, 326 U.S. 1, 6 (1945), this Court said:

> "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them."

Also, to the same effect, *Sartor v. Arkansas Natural Gas Corp.* 321 U.S. 620 (1944), which was cited and relied upon by the Sixth Circuit in the *Groves* case.

There has always been conflict in the application of a standard to be applied in ruling on a motion for summary judgment under Rule 56. Some courts have placed emphasis upon different aspects of this rule. Judge Frank of the Second Circuit in *Arnstein v. Porter*, 154 F.2d 464 (1946), along with Learned Hand, put emphasis upon the value of a trial on the merits and the importance of oral testimony where the Judge and the Jury can assess the value of testimony. He further cautioned that the court should be reluctant to dispose of the case by means of "trial by affidavit", and that evidence may be presented in a trial which would change the entire complexion of the case from the way in which it appears on motion for summary judgment. Rule 56 was not designed to preclude plaintiff the privilege of examination of defendant at trial, especially as to matters peculiar with the defendant's knowledge.

which is the case here inasmuch as the relationship between the petitioner and BLM is one that is suspect, especially in view of the self serving affidavit of its president.

It is obvious, from the requirements in the contract between BLM and petitioner, that there are strong inferences to be drawn therefrom as to whether or not there was any control or agency. It is for this reason, that the Sixth Circuit reversed the trial court and felt that this case should be tried on its merits with the availability of cross-examination, appearance of witnesses, and, not a trial by paper.

We see no real inconsistency in the application of Rule 56 among the various circuits inasmuch as it would appear that each case is decided on its own set of facts.

The only relief which is available to respondent is based upon the franchise agreement to sell new cars. BLM is a complete stranger to plaintiff. If respondent does not have the right to try this case and to show that there is a relationship between the petitioner and its supplier then Title 15, Sections 1221, et seq., are thwarted. Respondent would be deprived of his cause of action simply because of the insertion of a second so-called distributor between the manufacturer and the petitioner.

The rationale of the petitioner's Brief and citations and his conclusions based thereon, is simply that Respondent's case is without any merit at all, and that it eventually will culminate in a directed verdict for the petitioner. It reasons that it is simply expedient to dispose of this case because of growing demands on the court system. This is not a valid reason for granting a motion for summary judgment. The action of the Sixth Circuit does not discourage use of the motion for summary judgment in a proper case.

CONCLUSION

It is respectfully suggested that there are no compelling reasons for granting the Writ of Certiorari and that said petition should be dismissed.

Respectfully submitted,

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